Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-1710

In The
Supreme Court of the United States

October Term, 1989

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THOMAS H. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Eleventh Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Petitioner Greene respectfully asks leave to call to the Court's attention the relevant discussion by Justice Blackmun's opinion (unanimous on this point) in Schmuck v. United States, ___ U.S. ___, 109 S.Ct. 1443, 103 L.Ed.2d 734 (Mar. 22, 1989). Rule 22.6. (We must acknowledge the availability of this authority to us at the time of filing petitioner's reply brief, in July.)

Schmuck decided, of course, that the propriety of a jury instruction on lesser-included offenses depends not on some problematic "inherent relationship" between the lesser and the charged offenses but on whether all the elements of the lesser are among those composing the greater.

The decisive principle, the Court held, is that under the Constitution the accused "cannot be held to answer" a charge composed of elements not charged by his

indictment. 109 S.Ct. at 1451, 103 L.Ed.2d at 747:

> It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Ex Parte Bain, 121 U.S. 1, 10 (1887); Stirone v. United States, 361 U.S. 212, 215-217 (1960); United States v. Miller, 471 U.S. 130, 140, 142-143 (1985). This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. United States v. Whitaker, 144 U.S. App. D. C., at 350-351 447 F.2d, at 320-321.

That precisely is the burden of Greene's petition, which asks the Court to restore that principle to the Eleventh Circuit where now it is held, United States v. Varkonyi, 645 F.2d 453 (5th Cir. 1981), United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986), but most dramatically in Greene itself, that an indictment's closing reference to the statute supplies from the statute a missing essential element.

Schmuck describes in practical terms the prejudice likely to occur if one looks

elsewhere than to the indictment for the elements composing the greater offense charged. Id., 109 S.Ct. at 1459, 103 L.Ed.2d at 734:

> Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, . . . the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment.

The scenario imagined in Schmuck was the reality of Greene's indictment, trial and appeal on counts One, Two and Three, from which he is entitled to be discharged; and on count Four on which he is entitled to a new trial.

Respectfully submitted,

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